

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

WP COMPANY, LLC D/B/A THE WASHINGTON  
POST

and

Cases 05-CA-036485  
05-CA-036574

WASHINGTON MAILERS' UNION NO. 29  
PRINTING, PUBLISHING, AND MEDIA  
WORKERS SECTOR OF THE COMMUNICATIONS  
WORKERS OF AMERICA, AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
EXCEPTIONS**

Gregory M. Beatty, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 5  
1099 14th Street, N.W., Suite 6300  
Washington, D.C. 20570  
202-208-3109  
202-208-3013 fax  
[Gregory.Beatty@nlrb.gov](mailto:Gregory.Beatty@nlrb.gov)

December 20, 2011

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE**

**I. OVERVIEW**

In this case, the Respondent, Washington Post, unlawfully engaged in direct dealing with its employees represented by the Washington Mailers' Union No. 29 Printing, Publishing, and Media Workers Sector of the Communications Workers of America, AFL-CIO (the Union). The Respondent bargained with individual employees in an effort to convince them to give up their right to a break after the employees had been asked to work through lunch. Although the judge found that (1) the contract required these lunch breaks and that there was a practice of granting them, (2) that some supervisors were now refusing to give these breaks, and (3) that supervisors were offering "deals" to employees in order to get them to give up these breaks, he nonetheless failed to find any direct dealing violation under Section 8(a)(5) of the Act. Accordingly, Counsel for the Acting General Counsel excepts to this failure to find a violation of the Act for direct dealing and asks the Board to

put an end to the Respondent's bypassing of the employees' collective-bargaining representative.<sup>1</sup>

## **II. FACTS**

### **A. The Respondent and the work in the mailroom**

The Respondent prepares newspapers for distribution in the mailroom of its Springfield, Virginia facility. Employees in the mailroom work on a number of different machines and operations. (GC33). For example, there are collators in the mailroom. (Tr. Forsythe 32). The collator collates the advertising supplements that go into the paper. (Id. at 33). After the package is prepared by the collator, some of them are sent right out to the loading docks. (Id.). Other packages are sent to the hand insert lines. (Id. at 33-34). Another machine in the lower mailroom is the palletizer, which stacks headsheets, or newspapers, on pallets. (Id. at 34). Some of the newspapers are sent out directly on trucks, and some newspaper stacks are then sent to the hand insert lines. (Id.). At the hand insert line, the insert package is inserted into the newspaper that just came from the palletizer. (Id. at 35). At the end of the insert line is a tying machine that ties the papers into a bundle. (Id.). Those bundles go right out to trucks on a conveyor, or they are stacked by helpers while waiting for the next truck to show up. (Id. at 36). The mailroom employees are in three classifications: mailers, helpers, and utility mailers. (Tr. Dunn 194). Mailers operate the machinery, helpers perform material handling, and utility mailers perform both mailer and helper work. (Id.)

The Union represents employees in the mailroom. (Id.). The Union has officials called Chapel Chairmen and Assistant Chapel Chairmen who oversee the contract and

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<sup>1</sup> There are no exceptions to the judge's dismissal of the allegations concerning assignment of work to non-unit hand inserters and a unilateral change in the lunch policy.

provide representational duties for the employees. The 1998-2003 collective-bargaining agreement, the most recent contract, is still being followed by the company according to the Respondent's Vice President of Labor, Jay Kennedy. (Tr. Forsythe 39).<sup>2</sup>

**B. The Respondent has a past practice and contractual obligation to give employees a break to eat something after those employees have worked through lunch**

The Respondent had a long-standing policy that when employees worked through lunch, they were given a break later on to get something to eat. In the past, according to the testimony of employees, these instances were not common. (Forsythe Tr. 49; Grossman Tr. 107; Leroux Tr. 127; Pullium Tr. 148). When it was necessary to work through lunch, employees were always given a break to get something to eat. (Forsythe Tr. 49 – “Always. I never, never had -- never, never not had an opportunity to get lunch;” Grossman Tr. 107; Leroux Tr. 128). This policy was enshrined in the CBA in Section 14(b): “The present practice providing for a coffee break, wash-up times, a break between doubleheader shifts, fifteen minutes for monthly chapel meetings, and time to get lunch when it is necessary to work through lunch shall be continued.” (GC3 at 17-18). James Forsythe, the Chapel Chairman for mailers, testified that this break would last 20 minutes. (Forsythe Tr. 52, 60). Employee Barbara Grossman<sup>3</sup> testified that this break would last 15 minutes. (Grossman Tr. 111). Whatever, the length, the unit employees performing the work in the mailroom testified that they always received these breaks. The judge found that there was a policy of permitting employees to get something to eat after they worked through lunch. (ALJD3, fn. 5; ALJD5, ll. 32-33).

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<sup>2</sup> The Respondent must follow this contract for those individuals who have a lifetime job guarantee. See GC2 at 43.

<sup>3</sup> Grossman is also the Helper Vice Chairman on the night shift and Recording Secretary of the Union.

When working through lunch, employees are entitled to be paid at the rate of time and a half. (Leroux Tr. 129). Wanda Jackson, a foreman for the Respondent, admitted that before she became a foreman when she worked through lunch, she was not guaranteed an hour of overtime, but was paid overtime based on the amount of lunchtime she worked through. (Jackson Tr. 187). Jackson also admitted she is not familiar with the CBA. (Jackson Tr. 181).

In the past, the Respondent would approach the Union and ask Union representatives to help find people who would be willing to work through lunch. However, in these cases, the employees were still allowed a break to get something to eat later on. "We all did work through lunch. She said she would pay us through our lunch and would find someone to give us a break, she would get someone to give us a break later." (Grossman Tr. 123, explaining when supervisor Tanya Coates asked for the Union's assistance in finding people to work through lunch; see also Grossman Tr. 124, testifying that Coates came to her on this issue because Grossman was a union representative).

**C. The Respondent has been making deals with employees to give up their right to a lunch break after working through lunch**

There is little dispute about the facts concerning this allegation. Forsythe testified that supervisor Joe Malenabe and Wanda Jackson admitted to him in November 2010 that they were asking employees to "volunteer" to give up their contractual right to a break after working through lunch, in exchange for a guaranteed hour of overtime, and that Jay Kennedy admitted the same during grievance meetings. (Forsythe Tr. 55, 57). The Union filed a grievance over the denial of the lunch breaks on November 3, 2010 and February

24, 2011. (GC6; GC7).<sup>4</sup> When Barbara Grossman spoke to Allen Martin, a superintendent, about the denial of these breaks, Martin candidly admitted to her that the company “had worked out a deal” with employees. (Grossman Tr. 108). Employee Brian Leroux testified that he was offered *two* hours of overtime to work through lunch, when the contractual obligation is simply time and a half. (Leroux Tr. 129). Employee Mark Pullium<sup>5</sup> testified that he was offered an hour of paid overtime to work through lunch if he gave up his twenty minute break later on to get lunch. (Pullium Tr. 146). In order to convince Pullium, who reminded the foreman of his right to a break, the foreman told him he would be “well compensated.” (Id.). Jackson admitted she is engaging in this practice of asking employees to work through lunch, paying them an hour of overtime, and then not giving them a break afterwards for lunch. (Jackson Tr. 188-89).

#### **D. The judge’s decision**

The judge’s decision concerning this allegation first stated some basic points of Board law, including that the employer must bargain with the employees’ collective-bargaining representative concerning their wages, hours, and other terms and conditions of employment. (ALJD at 6). The judge cited *The Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), for the proposition that direct dealing violations will be found if (1) the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union’s role in bargaining; and (3) such communication was made without notice to, or to the exclusion of the union. Id. The judge then cited *Emhart Indus.*, 297 NLRB 215, 225 (1989), and noted that there was no

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<sup>4</sup> The Respondent denied any wrongdoing and these grievances were never resolved.

<sup>5</sup> Pullium is the President of the Union.

direct dealing in that case where mandatory meetings were held on issues that were the subject of negotiations because no benefits were promised and there was no intent to undermine the union. *Id.* at 6-7.

The judge then offered his only paragraph of analysis concerning the instant allegation:

Under these circumstances, and particularly noting that no material changes in conditions of employment were established or implemented with respect to the lunch policy, it cannot be found that the Respondent bypassed the Union and dealt directly with employees regarding working through lunch as alleged in paragraph 6 of the complaint. *E.I. DuPont de Nemours & Company*, 301 NLRB 155 (1991) (Board held that employees understood that their participation in the video was voluntary and that the alleged direct dealing did not erode the union's representational status)

Counsel for the Acting General Counsel excepts to this finding because it ignores the record evidence and Board law that the Respondent deliberately bargained with individual employees in an attempt to eliminate their right to a lunch break, and that this bargaining undermined the union, all in violation of Section 8(a)(1) and (5) of the Act.

### **III. ANALYSIS**

#### **A. Acting General Counsel established that Respondent is engaging in direct dealing**

##### **1. Legal standard – Employers may not bypass employees' collective-bargaining representative to alter their terms and conditions of employment**

Board law is very clear that employers must first bargain with the exclusive collective-bargaining representative of its employees when it wishes to change the terms and conditions of their employment. *Armored Transport, Inc.*, 339 NLRB 374 (2003). “An employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment

violates Section 8(a)(5) and (1).” Id. In determining whether direct dealing has occurred, “the Board examines whether the employer's direct solicitation of employee sentiment over working conditions is likely to erode the union's position as exclusive representative.” Id., citing *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992); *U.S. Ecology Corp.*, 331 NLRB 223 (2000), *enfd.* 26 Fed.Appx. 435 (6th Cir. 2001). Although an employer may communicate with its unit employees, it may not circumvent their bargaining representative and engage in direct bargaining between the employer and the employees. *Putnam Buick*, 280 NLRB 868, 869 (1986), *affd.* 827 F.2d 557 (9th Cir. 1987).

The Board has previously found that bypassing the union to bargain with employees over the elimination of their contractually-guaranteed lunch break constitutes direct dealing. “It is clear that the lunch periods were a condition and term of employment and were embodied in the collective-bargaining agreement. Respondent dealt directly with the can-line employees and bypassed the Union by the unilateral elimination of the lunch periods in violation of Section 8(a)(5) and (1) of the Act. “*Pepsi America, Inc.*, 339 NLRB 986, 993 (2003).

**2. The Respondent bypassed the Union and bargained with the employees to give them overtime in exchange for giving up their lunch breaks**

The record demonstrates that the Respondent’s solicitation of employees to give up their right to a lunch break in return for extra overtime is unlawful direct dealing.

First, as demonstrated above, the terms and conditions of the employees require that they receive a break to eat lunch after they work through lunch. Four employees testified to this practice. (Forsythe Tr. 49; Grossman Tr. 107; Leroux Tr. 127; Pullium Tr. 148). Further, the judge found that there was such a practice. (“[A] small number of the

53 salaried foremen . . . were not adhering to the policy of permitting employees to get something to eat after they worked through lunch.” ALJD at 5, lines 32-33). Furthermore, Section 14(b)<sup>6</sup> of the contract requires that the employees get this break if they are required to work through lunch: “The present practice providing for a coffee break, wash-up times, a break between doubleheader shifts, fifteen minutes for monthly chapel meetings, and time to get lunch when it is necessary to work through lunch shall be continued.”

Second, the Respondent communicated directly with the union-represented employees in an effort to change this particular term and condition of their employment according to the following parameters: the employee would work through lunch in return for extra overtime, but would not get a break afterwards to get something to eat. Indeed, as Grossman testified, the supervisors defended the new practice by saying that they had a “deal” with the employees. (Grossman Tr. 108). Leroux testified that he was even offered *two* hours of overtime if he would work through lunch, the unstated trade-off being that he would give up his lunch break. (Leroux Tr. 129). Pullium testified that Wilson told him he would be “well compensated” if he gave up his lunch break later on. (Pullium Tr. 146).

Third, it is also clear that these communications were to the exclusion of the Union. In no case did the Respondent ask the Union to eliminate the employees’ right to a lunch break in return for overtime, but in each case the Respondent made a deal with individuals. (Grossman Tr. 108; Leroux Tr. 129; Pullium Tr. 146). Furthermore, Pullium specifically

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<sup>6</sup> The Respondent’s anticipated argument that Section 14(b) should not apply because it was not “necessary” for employees to work through lunch, rather that they “volunteered,” is unavailing. The Respondent, not a union-represented employee, determines when employees are “needed” to work through lunch. (Jackson Tr. 174-75).

testified that when he agreed to take the deal and give up his lunch break in return for being “well compensated,” he was not bargaining on behalf of the union. *El Paso Elec. Co.*, 355 NLRB No. 95, slip op. at 2 (Aug. 18, 2010) (finding union excluded when company made proposal to employee outside presence of union negotiators).

These actions undercut the Union, because the Respondent is bypassing the Union to set up new terms and conditions of employment at odds with the rights guaranteed to the employees in the CBA. Accordingly, the Respondent engaged in direct dealing as alleged in violation of Section 8(a)(5) of the Act.

The judge’s failure to make this finding should be reversed. First, the judge’s statement that “under these circumstances” there was no violation of the Act cannot be accepted. The judge did not state what circumstances he was relying on. His entire discussion of the allegation up to that point was a recitation of Board law. (See ALJD at 6-7). The only circumstances that the judge identified were that there was a policy that the Respondent was altering, which the record shows was done through direct negotiations with employees. Thus, his statement that the circumstances dictate the dismissal of the allegation is without foundation.

Second, the judge’s reliance on the fact that he found no 8(a)(5) violation for unilaterally changing the lunch policy is incorrect. Direct dealing violations are not derivative of unilateral change violations. In fact, the Board has held just the opposite. In *Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992), the Board found that the union waived its right to bargain over a smoking policy, but also held that the lack of an unlawful unilateral change did not privilege the employer to engage in direct dealing on this issue:

Our conclusion that the Union had contractually waived its bargaining rights so as to permit unilateral action by the Respondent respecting the

smoking policy does not extend to a finding that the Union also agreed that the Respondent could deal with employees as if the Respondent's work force had no bargaining representative. Direct dealing with employees goes beyond mere unilateral employer action.

Id. All that matters here is whether the employer is going around the union to negotiate directly with the employees about their lunch break. *Pepsi*, supra. Further, the judge's reliance on his finding of no unilateral change contradicts his other finding that there was a policy of lunch breaks that the foremen were circumventing. (See ALJD at 5, lines 32-33). Furthermore, the evidence is overwhelming that the method by which these foremen were getting around these requirements was through direct dealing.<sup>7</sup>

#### IV. CONCLUSION

Accordingly, the record shows that the Respondent has violated Section 8(a)(1) and (5) of the Act by engaging in direct dealing. The Respondent's undermining of the employees' collective-bargaining representative must be stopped through an appropriate Board Order.

Respectfully submitted,

/s/ Gregory M. Beatty  
Gregory M. Beatty, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 5  
1099 14<sup>th</sup> Street, N.W., Suite 6300  
Washington, D.C. 20570  
(202) 208-3109  
(202) 208-3013  
[Gregory.beatty@nrlrb.gov](mailto:Gregory.beatty@nrlrb.gov)

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<sup>7</sup> The actions of the Respondent in this case are distinguishable from cases cited by the judge, without analysis, where the Board has not found direct dealing. See, e.g., *Southern California Gas Co.*, 316 NLRB 979, 982 (1995) (finding no violation for a harmless collection of data from employees); *E.I. DuPont de Nemours & Co.*, 301 NLRB 155, 156 (1991) (finding no violation for asking employees to participate in the production of a videotape).

## CERTIFICATE OF SERVICE

I hereby certify that this Counsel to the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision and Brief in Support of Exceptions was electronically filed on December 20, 2011, and, on that same day, copies were electronically served on the following individuals by email:

Jacqueline Holmes, Esq.  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
(202) 879-3939  
(202) 626-1700  
[jholmes@JonesDay.com](mailto:jholmes@JonesDay.com)

Thomas R. Chiavetta, Jr., Esq.  
Jones Day  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
(202) 879-3939  
(202) 626-1700  
[tchiavetta@JonesDay.com](mailto:tchiavetta@JonesDay.com)

James Forsythe  
CWA Charter 14201 Washington Mailers, Local 29  
3420 Upton Road  
Baltimore, MD 21234  
[j.Forsythe@gmx.com](mailto:j.Forsythe@gmx.com)

/s/ Gregory M. Beatty  
Gregory M. Beatty, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 5  
1099 14th Street, N.W., Suite 6300  
Washington, D.C. 20570  
202-208-3109  
202-208-3013 fax  
[Gregory.Beatty@nlrb.gov](mailto:Gregory.Beatty@nlrb.gov)